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In the Supreme Court of the United States

OCTOBER TERM, 1986

ROBERT L. CLARKE, COMPTROLLER OF THE CURRENCY, PETITIONER

v.

SECURITIES INDUSTRY ASSOCIATION

SECURITY PACIFIC NATIONAL BANK, PETITIONER

v.

SECURITIES INDUSTRY ASSOCIATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE FEDERAL PETITIONER

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The centerpiece of respondent's argument is the novel proposition that 12 U.S.C. 36—which contains the McFadden Act's definition of the term "branch"—is wholly irrelevant to the question whether a given bank office in fact is a branch that is subject to the Act's geographical restrictions. Instead, respondent asserts, that question is answered by 12 U.S.C. 81, which provides that "[t]he general business of each national banking association shall be transacted" in the bank's home office and "in the branch or branches, if any, established or maintained by it in accordance with the provisions of section 36 of this title." Respondent reads this provision to require that national banks perform essentially *all* of their business at their home offices or at branches: "national banks may locate their business only at their headquarters or licensed

branches within the same state" (Br. 11; see *id.* at 12). For a number of reasons, this argument is fundamentally flawed.

1. a. Section 36(c) restricts the locations at which national banks may establish "branches." Section 36(f) in turn defines the term branch for purposes of the Section 36(c) restrictions. In full, Section 36(f) reads (emphasis added): "The term 'branch' as used in this section shall be held to include any branch bank, branch office, branch agency, additional office, or any branch place of business located in any State or Territory of the United States or in the District of Columbia *at which deposits are received, or checks paid, or money lent.*" As we explained in our opening brief (at 28-29), this provision provides on its face that a bank office is a branch only if it receives deposits, pays checks, or lends money. And this is the most sensible, as well as the only natural, reading of the statute. If the functions enumerated in Section 36(f) are only illustrative, the provision becomes unnecessary. It is hardly likely that Congress intended a definitional provision to be so nebulous—particularly when, as we have explained (Gov't Br. 30 n.18), the language of Section 36(f) was written as a response to a particular set of problems involving bank offices performing the enumerated functions.

Respondent's reading of Section 81 (12 U.S.C. 81), however, would render the carefully written language of Section 36(f) entirely nugatory. In respondent's view, Section 81 requires that *all* bank business be performed only at the main office or at a licensed branch; under this approach, any office that performs essentially *any* bank business is subject to the Act's geographical restrictions on the establishment of branches.[1] But if Section 81 has such

[1] Evidently recognizing that its broad assertions about the meaning of Section 81 cannot be reconciled with judicial authority and with longstanding practice in the banking industry, respondent subsequently acknowledges several exceptions to its reading of the provi-

a broad meaning, there would be no role in the statutory scheme for a separate definition of branch—let alone for the definition in Section 36(f), which explicitly limits branch offices to those performing a limited number of specifically enumerated functions. As a general matter, of course, a reading that would thus render a portion of a statute superfluous should be avoided. See *Exxon Corp.* v. *Hunt,* No. 84-978 (Mar. 10, 1986), slip op. 14; *Mountain States Telephone & Telegraph Co.* v. *Pueblo of Santa Ana,* No. 84-262 (June 10, 1985), slip op. 11. And that canon of construction has particular force here, where Section 81 was amended at the time of the passage of the McFadden Act to include an express reference to Section 36.

The implausibility of respondent's reading of Section 81 is confirmed by its novelty. While respondent insists that Section 81 establishes the "fundamental restriction" (Br. 5, 11) on the location of bank offices, so far as we are aware no court, in the 59 years that Section 36 has been in force, has looked to Section 81 in resolving a McFadden Act challenge to the location of bank offices. Instead, all of the many branching cases—including this Court's decision in *First National Bank in Plant City* v. *Dickinson,* 396 U.S. 122 (1969), upon which respondent itself relies (Br. 21)—have focused exclusively on the definition of the term "branch" contained in Section 36(f) in resolving such challenges, looking to whether the bank office involved performed one of the functions enumerated in that provi-

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sion: it acknowledges (Br. 15 n.13) that support functions not involving dealings with the public may be performed away from a bank's main office or branches, and (Br. 22-23 & n.23) that bank agents likewise may perform certain functions at nonbranch locations. As we explain below, these exceptions—which, as formulated by respondent in response to adverse precedent, find no basis in the language or purposes of the McFadden Act—are far too niggardly.

sion. See, *e.g.*, *Plant City*, 396 U.S. at 135-137; *Independent Bankers Association of America* v. *Smith*, 534 F.2d 921, 933, 938-948 (D.C. Cir.), cert. denied, 429 U.S. 862 (1976); *Colorado ex rel. State Banking Board* v. *First National Bank of Fort Collins*, 540 F.2d 497, 498-499 (10th Cir. 1976), cert. denied, 429 U.S. 1091 (1977); *Illinois ex rel. Lignoul* v. *Continental Illinois National Bank & Trust Co.*, 536 F.2d 176, 178 (7th Cir.), cert. denied, 429 U.S. 871 (1976). Under respondent's approach, all of these courts engaged in an unnecessary (and indeed improper) analysis.[2]

b. Respondent's approach is flawed even when Section 81 is viewed in isolation. Section 81 never has been understood to require that *all* bank business be performed at the bank's branch (or main) offices. To the contrary, shortly after its enactment, the Court flatly rejected the argument that Section 81 restricts all banking activities to a bank's main office; the Court held that a national bank could certify a check away from its main office, reasoning that "[t]he business of every bank, away from its office * * * is unavoidably done at the proper place by the cashier in person, or by correspondents or other agents." *Merchants' Bank* v. *State Bank*, 77 U.S. (10 Wall.) 604, 651 (1870).[3] The Court reached a similar conclusion some

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[2] Because no court ever has relied on Section 81 in finding the establishment of a bank office improper—and because the provision in fact is demonstrably irrelevant to the issue here—respondent is incorrect in attributing significance to the Comptroller's failure to mention Section 81 in his opinion (Br. 23-24). See *Schweiker* v. *Gray Panthers*, 453 U.S. 34, 50 n.22 (1981).

[3] Respondent attempts (Br. 23 n.23) to distinguish *Merchants' Bank* by reasoning that it involved the activity of an agent whose actions facilitated the provision of services at chartered locations. However narrowly its holding is characterized, however, *Merchants' Bank* must stand for the proposition that certain bank business may be performed away from the home office. And if bank agents may perform essential banking services away from the bank's main office, it is difficult to imagine why Congress would have wanted Section 81 to interfere with the activities of agents who are performing *nonbanking* activities.

50 years later when it endorsed the Attorney General's "well considered opinion" in *Lowry National Bank,* 29 Op. Att'y Gen. 81, 87 (1911), which construed Section 81 to recognize "a vital distinction between a mere agency for the transaction of a particular business and a branch bank wherein is carried on a general banking business." See *First National Bank* v. *Missouri,* 263 U.S. 640, 658 (1924).

Indeed, despite respondent's assertion to the contrary, Section 81 does not state that all bank business must be conducted at a branch or the home office.[4] Instead, it provides that the "general business of each national bank[]" is so confined. And that phrase has long been understood to reach only those activities that make up the "general banking business." The Attorney General's authoritative opinion in *Lowry National Bank* repeatedly uses the two phrases interchangeably. See 29 Op. Att'y Gen. at 85, 86, 87, 93 (construing Section 81 to include "the general banking business of a national bank").[5]

While the Act does not define the phrases "general business of each national bank[]" or "general banking business," they plainly refer to those activities that are

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[4] The legislative history confirms the congressional understanding that Section 81 did not confine all bank activities to the home office: when the provision was enacted in 1864 as part of the National Bank Act, Congress recognized that banks might perform certain activities on an interstate basis. See Cong. Globe, 38th Cong., 1st Sess. 1379, 1381 (1864) (acknowledging that banks from around the country would redeem their notes in New York City); see also *id.* at 2145. See generally Note, *Interstate Banking Restrictions Under the McFadden Act,* 72 U. Va. L. Rev. 1121, 1127 (1986).

[5] Respondent's attempt (Br. 13, 14 & n.11) to find significance in Congress's 1927 modification of Section 81, which changed the statute's reference from the "usual business of each national bank[]" to the "general business," is without merit. Well before the 1927 amendment, the two phrases were used interchangeably; the amendment simply codified the accepted notion that the "usual business" of a bank was the "general banking business." See *Lowry National Bank,* 29 Op. Att'y Gen. at 85, 91.

essential attributes of a bank's role as a provider of depository and related banking services.[6] The Court has long recognized, for example, that "the business of banking consist[s] [of] receiving deposits, * * * discount[ing] bills and notes and * * * loan[ing] money." *Oulton* v. *Savings Institution,* 84 U.S. (17 Wall.) 109, 118 (1872). See also *Melton* v. *Unterreiner,* 575 F.2d 204, 207 n.4 (8th Cir. 1978); *Leuthold* v. *Camp,* 273 F. Supp. 695, 700 (D. Mont. 1967), aff'd, 405 F.2d 499 (9th Cir. 1969). As we explain in our opening brief (at 40-41), discount securities brokerage plainly does not fall into this class of activities.[7] And while banks are authorized to offer discount brokerage by 12 U.S.C. (Supp.II) 24 Seventh, as respondent notes (Br. 13-14), that in itself hardly makes the purchase and sale of securities a part of the general banking business. To the contrary, Congress in Section 24 Seventh expressly distinguished the "business of banking" from the "business of dealing in securities and stock." In any event,

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[6] As the Attorney General explained in *Lowry National Bank,* a bank office that carries on a "general banking business" is, as the language suggests, one that "competes in all branches of the banking business with other banks in that locality the same as if it were an independent institution" (29 Op. Att'y Gen. at 88). Because, as we explain below, discount brokerage is not an aspect of the banking business at all, there is no need in this case for the Court to determine the precise contours of such a "general banking business." At a minimum, however, an office conducting such a business must—by taking deposits, making loans, and offering related services—provide a range of those services that attract customers to traditional banking institutions. See Note, *Interstate Banking Restrictions Under the McFadden Act,* 72 U. Va. L. Rev. 1121, 1128 (1986).

[7] Respondent relies (Br. 14 n.10) on *Securities Industry Ass'n* v. *Board of Governors,* 468 U.S. 207 (1984), in its argument that securities brokerage is an aspect of the business of banking. In fact, the Court there upheld the acquisition of a discount brokerage operation by a bank holding company on the theory that securities brokerage services are *nonbanking activities* that are closely related to banking. See *id.* at 210-211, 214-216.

banks may undertake any number of activities—those involving travel and data processing, the sale of bullion, medals and tokens, the distribution of travelers' checks, and the like—that are functionally unrelated to banking; an office that offers only one of these services plainly is not engaged in a "general banking business."

2. a. Because it devotes most of its attention to Section 81, respondent makes only a halfhearted argument (Br. 20-23) that discount brokerage offices are branches within the meaning of Section 36(f). In doing so, it relies primarily on a statement by Rep. McFadden (Br. 20) and on this Court's decision in *Plant City*. As we explained in our opening brief (at 33-34 n.23), however, Rep. McFadden's post-enactment statement, which reflected his hostility to liberalized branching, is not probative of congressional intent.[8] The *Plant City* decision, meanwhile, expressly declined to resolve the question whether branches may include bank offices other than those performing one of the three enumerated functions, and its analysis is entirely consistent with the Comptroller's position (see Gov't Br. 35-36).

Respondent also asserts that the Comptroller's reading of Section 36(f) is inconsistent with "the holdings of every appellate court to have addressed the issue" (Br. 21-22). This proposition is, again, substantially overstated. As we explained in our opening brief (at 40 n.26), while several courts have used broad language in describing the defini-

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[8] Respondent suggests (Br. 20 n.21) that this Court has found Rep. McFadden's statement "highly significant." This assertion is substantially overstated. While the Court in *Plant City* cited the statement (396 U.S. at 134 n.8), it did not rely on the substance of Rep. McFadden's expanded definition of the term "branch." Instead, the Court cited his comment in the portion of its opinion holding that federal rather than state law is controlling in the determination whether a bank office is a branch. See *id.* at 130-134. In that respect, Rep. McFadden's comment was consistent with the language and legislative history of the Act.

tion of the term "branch," virtually all have grounded their holdings in branching cases on a finding that the bank office in question was in fact conducting one of the three functions enumerated in Section 36(f).[9]

b. Amicus Independent Bankers Association of America (IBAA) makes a different argument under Section 36(f). It suggests that the Comptroller's ruling will skuttle competitive equality between national and state banks. In the IBAA's view, national banks will obtain an edge over state-chartered institutions in the competition for banking customers if they are permitted to operate nonbanking offices, such as discount brokerage facilities, free from Section 36(c)'s branching restrictions (see Br. 16-17). Therefore, the IBAA concludes, such offices should be deemed branches.

The short answer to this assertion is that it is inconsistent with the language of the Act. The IBAA's argument concededly (IBAA Br. 14-15) turns on its contention that the three functions enumerated in Section 36(f) are not the exclusive hallmarks of a branch. That contention is fully answered above (at 2) and in our opening brief (at 27-38). Indeed, the language of Section 36(f) makes clear that Congress was not concerned with assuring that national and state banks would have identical authority in the *nonbanking* aspects of their operations.[10] Instead, the Act was intended to guarantee competitive equality in the provi-

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[9] The only exception to this is the divided opinion of the Eighth Circuit in *St. Louis County National Bank* v. *Mercantile Trust Co.*, 548 F.2d 716 (8th Cir. 1976), cert. denied, 433 U.S. 909 (1977). As we explained in our opening brief (at 40 n.26), that decision was incorrect and is, in any event, distinguishable from the situation here.

[10] Similarly, nothing requires that the substantive powers granted national and state banks by the federal and state governments, respectively, must be identical—even though the grant of additional powers to one or another group of banks might well affect their ability to compete.

sion of the basic banking services enumerated in Section 36(f) (see Gov't Br. 29-33). Whether or not limitations on the operation of nonbanking offices of the sort urged by the IBAA are desirable, they are not imposed by the McFadden Act. See generally *Board of Governors* v. *Dimension Financial Corp.*, No. 84-1274 (Jan. 22, 1986), slip op. 6-7, 12.

In any event, it is implausible to assert, as does the IBAA (Br. 14), that a national bank's ability to establish discount brokerage operations free from the Act's branching rules will provide national banks with an advantage in the competition for deposits and other banking business. It is true, of course, that a bank that offers a full range of services (including both traditional banking services and discount brokerage) at one location may have a competitive advantage over a bank that does not. Such a range of full-service banking and financial services, however, may be offered only at a bank's branches or main office. In contrast, a customer may not conduct his banking business at a nonbranch securities office. And it is hardly likely that the opportunity to obtain discount brokerage services at such a bank office will induce a customer to transfer his account to some other, inconvenient office of the same bank. It surely would be farfetched, for example, to suggest that a customer who uses discount brokerage services offered by Security Pacific at a New York City office will transfer his account from a New York bank to one of Security Pacific's California banking offices.[11]

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[11] The harm postulated by the IBAA is entirely speculative for another reason as well: the IBAA fails to identify any state law that imposes locational restrictions on the operation of discount brokerage offices by state banks. Moreover, to the extent that the effect of national bank securities activities on competitive equality is relevant here, resolution of the case requires a well-developed record that can best be compiled when suit is brought by a state bank—a consideration that helps make clear respondent's lack of standing (see Gov't Br. 16, 21-22 n.12).

3. Respondent's arguments on standing simply fail to come to grips with the meaning of the zone of interests principle. Respondent suggests (Br. 26-27) that the zone of interests test was created to liberalize the standing requirements imposed by the earlier "legal interest" doctrine. Even if this is so, however, it hardly answers the question whether respondent's claim satisfies the requirements of the zone of interests test.

On the substance of the standing question, respondent essentially relies on three cases (*Association of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U.S. 150 (1970); *Arnold Tours, Inc.* v. *Camp*, 400 U.S. 45 (1970); and *Investment Co. Institute* v. *Camp*, 401 U.S. 617 (1971)) which held that bank competitors had standing to challenge bank activities under statutes other than the McFadden Act, as well as on respondent's conceded ability to challenge the activities of banks under the Glass-Steagall Act (12 U.S.C. (& Supp. II) 24; 12 U.S.C. 78, 377, 378). Respondent draws from these cases the principle that all persons injured by the activities of their competitors have standing to challenge that activity in court—in other words, that, so long as Congress arguably has legislated against a given activity, anyone affected by that activity has standing to sue.

This approach would essentially read the zone of interests test out of the law by making competitive "injury in fact" sufficient to establish standing in every case. Yet both this Court and the lower courts repeatedly have indicated that the existence of standing—even when the plaintiff has been injured—turns on whether Congress "intended to protect" a given class of litigants. *Brock* v. *Pierce County*, No. 85-385 (May 19, 1986), slip op. 7 n.7. See cases cited at Gov't Br. 17-18. As we explained in our opening brief (at 22-26), the cases upon which respondent relies are wholly consistent with this principle; they held only that, in the face of congressional *silence* about who is

to benefit from given legislative action, the zone test is satisfied when "Congress ha[s] arguably legislated against the competition that the [plaintiff seeks] to challenge." *Investment Co. Institute*, 401 U.S. at 620. See *Arnold Tours*, 400 U.S. at 46; *Data Processing Organizations*, 397 U.S. at 155-156. Determining whether a given litigant has standing therefore turns upon an examination of the language and legislative history of the statute at issue (see Gov't Br. 17-19).

When that examination is undertaken, it becomes clear that the distinction between the situation here and that in the cases cited by respondent is not, as respondent asserts, "only * * * that the restriction at issue in this case applies to the location rather than the substance of bank activities" (Br. 28). Instead, the crucial difference is that, as we demonstrated at length in our opening brief (at 19-21), Congress intended the Act's geographical restrictions to benefit only a *single* group of national bank competitors—a group to which respondent does not belong. Respondent offers no challenge to the overwhelming evidence of this congressional intent marshalled in our opening brief.[12] And because the Act was "intended only to protect" state banks, "there [is] no need to provide [respondent] with any remedy at all." *Pierce County*, slip op. 7 n.7.

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[12] Repondent again relies on Section 81 in arguing for standing (Br. 30-31), asserting that Congress intended that provision's restriction on bank activities to benefit all bank competitors. But Congress amended Section 81 at the time of the enactment of the McFadden Act in 1927 to make it conform—and to include an express reference—to Section 36. And as we explained in our opening brief, Congress explicitly indicated that the McFadden Act's geographical restrictions on the operation of national bank branches were imposed for the benefit of state banks. This history establishes that, in the congressional view, the entire set of restrictions on the activities of national banks were intended to benefit their state bank competitors.

For the foregoing reasons and the reasons stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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